

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 26 OF 2019**

EDES JOHN MLINGI.....APPLICANT

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

DAR RAPID TRANSIT AGENCY (DART).....2ND RESPONDENT

UBUNGO MUNICIPAL COUNCIL.....3RD RESPONDENT

RULING

Date of Last Order: 8/7/2019

Date of Ruling: 31/12/2019

S.M. KULITA, J.

This ruling is a Preliminary Objection on point of law raised by the Advocate for the 1st and 2nd Respondents herein to the effect that:-

- (i) That the said application for a temporary injunction is premature as there no original matter before the court.
- (ii) That the application is contrary to order XXXVII of the Civil Procedure Code (CPC).
- (iii) That the court has not been properly moved by the applicant.

When the matter came up for hearing Ms. Angela Rushagara, learned Principle State Attorney appeared for the 1st and 2nd Respondents while Mr. Mohamed Muya learned Counsel appeared for the Applicant.

In her submission in support of the preliminary objection counsel for the Respondents submitted that one of the grounds which can make the court to order a temporary injunction is the presence of matter (main suit) before the court. She further submitted that Order XXXVII, Rule 1 and Rule 2 of the CPC. While Rule 1 mentions the presence of suit Rule (2) talks about commencement of the suit. Therefore there must be a pending suit before the application for injunction being filed. She submitted that the applicant not mentioned any case which is pending prior to the filing of this application.

The Counsel further submitted that even the 90 days' notice shows to have been made on 09/04/2019 and eight days later ie. 17/04/2019 the applicant brought the present application. The counsel pointed Section 6(2) of the Government Proceedings Act [Cap. 5 R.E 2002] stating that the application at hand contravenes it as the prescribed period of 90 days' notice after the issuance of notice have not lapsed which means that there is no main case before this court, thus even the application at hand was wrong to be present before the court. The counsel contended that the application be struck out. The counsel further invited this court to refer decision of **IBRAHIM V. NGAIZA (1971) HCD 249** in which among other things it was held that granting injunction is the discretion of the court where there is a pending case at the court where the application has been filed. She added that even Section 68(e) of the CPC cited by the applicant's counsel applies where there is already a matter before the court.

The State Attorney further submitted that Order XXXVII, Rule 1 and 2 prohibits temporary injunction to be granted against the government save for a declaratory order. As for the provision of Section 95 of the CPC she contended that it safeguards the inherent powers of the court in granting order, it is not for a party to rely upon in its application. She invited this court in the case of **TANESCO V. IPTL & 2 OTHERS (2008) TLR 324**. She submitted that even in the Chamber Summons of the applicant there is no provision which gives the court powers to grant the temporary injunction in absence of the suit. She further submitted that none citation or wrong citation renders the application incompetent as it was decided in the case of **EDWARD BACHWA & 3 OTHERS Civil Appl. No. 128 of 2006 (unreported)**. She said that since there is no proper provision to support this application she prays for the application be dismissed for being made contrary to the law.

In reply, counsel for the applicant submitted that the allegation that the application is incompetent for the absence of main case before the court is incorrect due to the reason that immediate intervention is needed as the structure in dispute is about to be demolished by the respondent. He said that the requirement of the presence of main case in such like application as celebrated in the old case of **ATILIO v. MBOWE (1969) HCD 284** is no longer needed. He cited the **Commercial Case No. 57 of 2000, PHILEMON JOSEPH CHACHA & OTHERS V. SOUTH AFRICAN AIRWAYS (PROP) LTD & OTHERS (NUMBER 1)** to support his argument. He said that as for the nature of this case the 1st Respondent was supposed to be served a 90 days' notice before instituting the suit but while the applicant was in the process of serving the AG the applicant had already issued a very

serious notice intending to demolish the suit promise, therefore the counsel is of the view that it was necessary to appear before the court so that the said demolition could not be affected. He said that the law requires that the case to be filed after the expiry of the notice period but through the current case of **PHILEMON JOSEPH CHACHA & OTHERS V. SOUTH AFRICAN AIRWAYS (PROP) LTD & OTHERS (supra)** the application can be granted. He also stated that the provision cited by the applicant are proper for the nature of the application at hand.

In rejoinder submission Ms. Angela Rushagara, State Attorney submitted that the submission which had been made in respect of Sections 95, 68(e) and Order XXXVII, Rule 1 and 2 do not give power to the court to entertain the application at hand which has been brought under chamber summons. She said that normally the court is moved according to the law and makes decision according to the law. She further said that the provisions cited by the applicant do not give power to court to grant temporary injunction. She cited the case of **ARUSHA MUNICIPAL COUNCIL V. LYAMUYA CONSTRUCTION COMPANY LIMITED (1998) TLR 13** to cement his argument. The counsel is of the view that the case of **Philemon Joseph Chacha (supra)** is distinguishable as there was a main suit.

Upon making a careful consideration to the submissions of both parties and without hitting into the bush it is my considered view that for the order of this nature to be considered by the court there must be a matter pending before it. Order XXXVII, Rule 1 and 2 of the Civil Procedure Code [Cap 33 R.E 2002] provides so. Also in view of Section 6(2) of the Government Proceedings Act [Cap.5 R.E 2002] which requires 90 days' notice to be issued before the suit is filed, this

application is wrong before the court. In **IBRAHIM V. NGAIZA (1971) HCD 249** it was held that in application like this one there must be the suit pending before the court.

Though it has not been argued by either party I also wish to clarify that the 2nd Respondent being the Municipal Council section 190(1) of the Local Government (District Authorities) Act [Cap 287 RE 2002] requires the advance notice of 30 days before it is sued. Therefore the requirement of prior notice has not been complied not only to the 1st Respondent but also to the 2nd Respondent.

Another thing to note here is that though it was not pleaded nor submitted by the applicant's counsel, there is a land suit before this court registered as Land Case no. 22 of 2019. The said case is pending and was filed on the same date with the application at hand on the 25/4/2019. Failure of the applicant's counsel to disclose the presence of that suit is also an indication that he knows the same is wrong before this court as it was filed before the expiry of the prescribed time for the respondents to be sued, that is 90 days for the 1st Respondent and 30 days for the 2nd Respondent.

In the upshot and for the foregoing reason this application for a temporary injunction is dismissed for want of merit. No order as to costs.



S.M. Kulita

JUDGE

31/12/2019